Application No.

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Supreme Court of the United States

October Term, 1953

No. 727

KATHERINE SHELLHAMMER, General Administratrix of the Estate of WALTER R. SHELLHAMMER, deceased,
Petitioner,

vs.

LEHIGH VALLEY RAILROAD COMPANY, a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI OF THE SUPREME COURT OF THE STATE OF NEW JERSEY

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Supreme Court of the United States

October Term, 1953

No.

KATHERINE SHELLHAMMER, General Administratrix of the Estate of WALTER R. SHELLHAMMER, deceased,
Petitioner,

vs.

LEHIGH VALLEY RAILROAD COMPANY, a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI OF THE SUPREME COURT OF THE STATE OF NEW JERSEY

Katherine Shellhammer prays that a writ of certiorari issue to review the mandate of the Supreme Court of the State of New Jersey entered in the above entitled action on the 25th day of January, 1954.

Opinion Below

The opinion of the Supreme Court of the State of New Jersey, not officially reported as yet, is annexed hereto.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1254.

Questions Presented

1. Where the evidence permits of but one inevitable, logical inference, does such inference meet the quantum of proof necessary to establish a violation of a statutory duty imposed by the Safety Appliance Act, 45 U. S. C. Section 1, *et seq.*

2. In a death action for damages, predicated on the provisions of the Federal Employers' Liability Act, 45 U. S. C. Section 51, *et seq.*, is circumstantial evidence sufficient to establish a prima facie cause of action where the proven facts permit of but one inevitable, logical inference: that the employee could not have been killed by the train at which he was working but for a breach of duty on the part of his employer.

3. May a railroad create immunity for itself, from the obligations imposed by the provisions of the Federal Employers' Liability Act, *supra*, by asserting its own rules, irrespective of the standard of care long established by railroads generally throughout the United States, as the custom and practice of the trade.

Reasons For Granting the Writ

1. Benefits provided by Acts of Congress, being matters of general public concern, any evasion or curtailment thereof, as in the case at bar, constitute a matter of great and general importance, meriting a review by this Court.

2. Petitioner's offer of proof, as to the established standard of care promulgated by railroads generally throughout the United States and adopted as the established custom and practice of the trade, was rejected by the Trial Court, on the sole basis that only the rules of the respondent railroad were material and admissible as evidence.

Such revolutionary new rule, which in effect grants immunity to a violator of the provisions of the Federal Employers' Liability Act, *supra*, contrary to the intent of Congress,[1] and which permits a railroad, through the expediency of creating its own standard of care to escape liability for breach of a duty recognized by all other railroads, merits review by this Court.

3. Petitioner was denied due process of law[2] by the action of the trial judge in taking from the jury, onto himself, the decision of disputed factual issues, solely on the

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[1] 45 U. S. C., sec. 51 *et seq.*:

"Sec. 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees for negligence; definition of employees.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404."

[2] Constitution of the United States, Fifth Amendment.

basis that it was for him and not the jury to decide issues of fact when established by circumstantial evidence.

The decision of the lower Court, sustaining the action of the Trial Court in directing a verdict at the close of plaintiff's case under such circumstances, is a matter of general concern and utmost importance and seems to be a denial of a most importance constitutional right: "trial by jury".[3]

Statement

This is an action pursuant to the provisions of the Safety Appliance Act, *supra*, and the Federal Employers' Liability Act, *supra*.

Katherine Shellhammer, as Administratrix on behalf of herself and her three children, Nancy, 16 years of age, Raymond, 10 years of age and Jane, 18 months old, respectively, claimed damage for the wrongful death of her husband, Walter R. Shellhammer.

Walter R. Shellhammer, the decedent herein, was employed by the respondent as a car inspector leader as supervisor of car inspectors (P7a-11).

The decedent was 45 years of age (P11a-25).

On the 13th day of January, 1951, the decedent was last seen alive by John Gumhold, a car inspector, who "okayed" the train (P45a-26). Gumhold told the yardmaster of the train was "okay" (P46a-29). Thereafter, an air test was made by John P. Hann, the engineer, who fixes the time of said test at shortly after 8:00 p. m. (P91a-20). He stated no further tests were made (P88a-

[3] Constitution of the United States, Seventh Amendment.

14).[4] He fixed the time that the train pulled out at about 8:15 or 8:20 p. m. (P91a-16).[5]

James P. O'Donnell, the trainman, fixes the interval of time from the last coupling and the starting of the train at approximately 15 minutes (P67a-19).[6]

The body was discovered by Michael Kobal, a trainman, who reported it to Joseph S. Smith, the yardmaster, at 8:30 p. m. (P19a-18). Decedent's head was between the tracks on the north side of the rail and the body on the south side (P20a-27), 2½ car lengths east of Washington Street crossing and #3 track (P20a-3).

It was stipulated that the decedent was engaged in Interstate Commerce at the time of his death (P11a-6).

It was stipulated that the first sign of blood was found on the second wheel from the front end of the 24th car in the train (P11a-19).

At the close of plaintiff's case, the defendant moved for judgment in its favor, which the Trial Court granted.

From the judgment entered thereon, the plaintiff appealed to the Appellate Division of the Superior Court of the

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[4] Q. During those 10 minutes, did you make any other tests from the last test to the time the train pulled out? A. It is not necessary.
Q. Therefore you didn't make it? A. That is right.
Q. Therefore you made no test after 10 minutes? A. No, sir.

[5] Q. The time when you got it completely finished and assembled ready to go? A. It was about 8:15 or 8:20 when we pulled out.

[6] Q. And it was after that coupling that the train moved out, 15 minutes later. Is that correct? A. You are not figuring what transpired between that period, you are just talking time?
Q. That is right. A. I would say, from the time we made that coupling, I would say about 15 at the latest; I figure 15 minutes, maybe not to a minute, but 15 minutes I would say.

State of New Jersey which Court affirmed the judgment of the Trial Court on the 29th day of April, 1953.

Plaintiff then petitioned the Supreme Court of New Jersey for certification to the Appellate Division to review the judgment of the Appellate Division affirming the Superior Court of New Jersey, which petition was granted on September 14, 1953.

The Supreme Court of the State of New Jersey, after argument on November 30, 1953, affirmed the judgment of the Superior Court, Appellate Division, on the 25th day of January, 1954.

ARGUMENT

POINT I

The defendant was liable as a matter of law for violating its statutory duty imposed by the Safety Appliance Act, *supra*.

The probabilities or inferences that Shellhammer met his death while in the act of replacing a defective air hose can reasonably be drawn from the following facts:

Shellhammer was last seen alive in respondent's yard at Washington Street, Jersey City, New Jersey (P47a-21, P7a-13). He was not wearing gloves (P80a-34), and there was no air hose on the ground or any place in the vicinity of the train (P63a-5). Later, Shellhammer's body was found in the vicinity of where he had last been seen alive, wearing a work glove on his left hand (P56a-30) and with a discarded air hose near his body (P55a-7). Both Edward J. McKenna and James P. O'Donnell testified to the absence

of any hose coupling in the vicinity prior to the accident (P62a-28-63a-8),[7] (P64a-17-31).[8]

The two car inspectors working under Shellhammer's supervision testified as to the work they each did (P47a-17, P79a-80a). Neither testified that he changed the air hose.

The evidence is that an air hose may spring a leak, the same as an auto tire, without any prior notice (P85a-28-35).

Dr. Manuel Hernandez, Deputy County Physician, explained that when the pressure of the front wheel was

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[7] Q. Did you at any time during the day or evening have occasion to go east of the Washington Street crossing? A. In the tour of duty?

Q. Yes. A. Starting as of 3:00 o'clock?

Q. Yes. A. Why, of course.

Q. How many times would you say your were east? A. That I can't answer.

Q. Were you over in the vicinity of say the third electric pole? A. I may have went even further.

* * *

Q. At any time you were there, did you see any objects such as coupling hose lying around the tracks? A. Not that I can recall.

[8] Q. What time was that you started walking down? A. Approximately 8:00 o'clock, maybe a few minutes before 8:00.

Q. As you walked down did you have a flashlight?

* * *

A. No flashlight. I had a white light and a red light.

Q. Were you able to see the ground? A. Surely.

Q. Did you see any coupling hose there on the south side? A. No, sir.

released, the blood might come down on the after part of the train (P42a-25-P43a-9).[9]

These facts justify the inference that after the two car inspectors had concluded the work, given the "okay" signal and left, that Shellhammer observed that a leak had sprung in the hose between the 23rd and 24th cars; that he thereupon put on his work gloves, shut off the air supply, replaced the defective hose with a good one, threw the defective hose on the ground where it was subsequently found and just as he turned the angle cock to turn the air on, the train started and killed him. Therefore, the direct and proximate cause, in whole or in part, was a defective part of the train break system.[10]

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[9] Q. Doctor, could you give us an opinion as to how long it would take for the blood to come out of the body when a wheel goes over it, and where decapitation has resulted? A. Can I answer that question?

The Court: There is no objection.

The Witness: I believe, this is, of course, my own personal belief—I believe that a train cutting through the neck would seal the injury quite markedly so that it would allow very little bleeding. It crushes the tissues so hard that it would not allow an awful lot of bleeding. Subsequently, as the train went by, I think the expulsion of blood might come down from the after part of the train rather than the part that first came in contact with him. That is my opinion.

Mr. Broadhurst: I am moving to strike that out, the latter part because it is based upon a possibility.

The Court: Strike out the word "subsequently".

[10] Title 45, U. S. C., Section 1: Driving-wheel brakes and appliances for operating train-brake system

It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose. Mar. 2, 1893, c. 196, Sec. 1, 27 Stat. 531.

In the case of *Saxton* v. *Delaware & Hudson Co.* (1931) 256 N. Y. 363, 176 N. E. 425, Justice Lehman rendering the decision, Chief Justice Cardozo and Justices Pound, Crane, Kellogg and Hubbs concurring, held that a defendant is liable for the result of a violation of its statutory duty, even if it exercised reasonable care in inspecting the coupler and in operating the freight train.

O'Donnell v. *Elgin, J. & E. Ry. Co.* (1949), 70 S. Ct. 200, 338 U. S. 384, a death action predicated on the Safety Appliance Act, *supra*, and Federal Employers' Liability Act, *supra*, held:

> "But this Court early swept all issues of negligence out of cases under the Safety Appliance Act. For reasons set forth at length in our books, the Court held that a failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong, in no way dependent upon negligence and for the proximate results of which there is liability—a liability that cannot be escaped by proof of care or diligence. St. Louis, Iron Mountain & Southern R. Co. v. Taylor, 210 U. S. 281, 294, 28 S. Ct. 616, 620, 52 L. Ed. 1061; Chicago, B. & Q. R. Co. v. United States, 220 U. S. 575-577, 31 S. Ct. 615-617, 55 L. Ed. 582; Delk v. St. Louis & San Francisco R. Co., 220 U. S. 580, 31 S. Ct. 617, 55 L. Ed. 590. These rigorous holdings were more recently epitomized by Chief Justice Hughes, speaking for the Court: 'The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one, and the carrier is not excused by any showing of care, however assiduous.' Brady v. Terminal Railroad Ass'n of St. Louis, 303 U. S. 10, 15, 58 S. Ct. 426, 429, 82 L. Ed. 614" (p. 204).
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> "As to the claim based on the Safety Appliance Act, we hold that the plaintiff was entitled to a peremp-

tory instruction that to equip a car with a coupler which broke in the switching operation was a violation of the Act, which rendered defendant liable for injuries proximately resulting therefrom, and that neither evidence of negligence nor of diligence and care was to be considered on the question of this liability" (p. 206).[11]

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[11] *Affolder* v. *New York C. & St. L. R. Co.*, 70 S. Ct. 509, 339 U. S. 96, affirmed its decision in, and quoted *O'Donnell* case, *supra*. In the case of *Louisville & Jeffersonville Bridge Co.* v. *U. S.*, 39 S. Ct. 355, 249 U. S. 534, the Court held:

"* * * the construction which the act should receive is not to be found in balancing the dangers which would result from obeying the law with those which would result from violating it, nor in considering what other precautions will equal, in the promotion of safety, those prescribed by the act. Such considerations were for Congress when enacting the law and it has repeatedly been held by this court that other provisions of the Safety Appliance Act impose upon the carrier the absolute duty of compliance in cases to which they apply, and that failure to comply will not be excused by carefulness to avoid the danger which the appliances prescribed were intended to guard against, nor by the adoption of what might be considered equivalence of the requirements of the Act. St. Louis, Iron Mountain etc. Ry. v. Taylor, 210 U. S. 281, 295, 28 S. Ct. 616, 52 L. Ed. 1061; Great Northern Ry. Co. v. Otos, 239 U. S. 349, 36 S. Ct. 124, 60 L. Ed. 322; St. Joseph & G. I. Ry. Co. v. Moore, 243 U. S. 311, 37 S. Ct. 278, 61 L. Ed. 741" (p. 359).

In the case of *Urie* v *Thompson*, 69 S. Ct. 1018, 337 U. S. 163, this concise statement was made:

"In this view the Safety Appliance Acts, together with the Boiler Inspection Act, are substantively if not in form amendments to the Federal Employers' Liability Act. They dispense, for the purposes of employees' suits, with the necessity of proving that violations of the safety statutes constitute negligence; and

POINT II

The broad purposes of the Federal Employers' Liability Act, *supra*, were defeated by the dismissal of the action at the close of plaintiff's case.

There was a clear breach of duty under the provisions of the Federal Employers' Liability Act, *supra*.

The leading case of *Urie* v. *Thompson*, 69 S. Ct. 1018, 337 U. S. 163, on page 1030 enunciated the existing judicial thought regarding interpretation of the provisions of the purposes of the Federal Employers' Liability Act, *supra*. Justice Rutledge, delivering the opinion of the Court, stated:

> "Considerations arising from the breadth of the statutory language, the Act's humanitarian purposes, its accepted standard of liberal construction in order to accomplish those objects, the absence of anything in the legislative history indicating a congressional intent to require a restricted interpretation * * *

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making proof of such violations is effective to show negligence as a matter of law" (p. 1034).

The case of *Brady* v. *Terminal R. Ass'n. of St. Louis*, 58 S. Ct. 426, 303 U. S. 10, again affirmed this holding as follows:

> "The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one, and the carrier is not excused by any showing of care, however assiduous" (p. 429).

See also: *Zumwolt* v. *Gardner*, 160 Fed. 2d 298; *N. Y., N. H. & H. R. Co.* v. *Leary*, 204 Fed. 2d 461; *Davidson* v. *Peoria, etc. R. Co.*, 203 Ill. App. 498; *United States* v. *Northern Pac. R. Co.*, 287 Fed. 780; *Williams* v. *New York Central R. R. Co.*, 402 Ill. 494, 84 N. E. 2d 399; *Pennsylvania Co.* v. *U. S.*, Ohio 1917, 241 F. 824, 154 C. C. A. 526, affirming, D. C., 237 F. 471; *U. S.* v. *Chicago & A. R. Co.*, C. C. A. Ill. 1918, 250 F. 101; *McDonald* v. *Great Northern Ry. Co.*, Minn. 1926, 207 N. W. 194, 166 Minn. 87; *Auslender* v. *Boettcher*, 1926, 242 P. 672, 78 Colo. 427.

and the trend of existing authorities dealing with the question, combine to support this conclusion.

We recognize of course that, when the statute was enacted, Congress' attention was focused primarily upon injuries and death resulting from accidents on interstate railroads. Obviously these were the major causes of injury and death resulting from railroad operations. But accidental injuries were not the only ones likely to occur. And nothing in either the language or the legislative history discloses expressly any intent to exclude from the Act's coverage any injury resulting 'in whole or in part from the negligence' of the carrier. If such an intent can be found, it must be read into the Act by sheer inference.

The language is as broad as could be framed: 'any person suffering injury while he is employed'; 'such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier'; by reason of any defect or insufficiency, due to its negligence, in its cars engines, appliances,' etc. On its face, every injury suffered by any employee while employed by reason of the carrier's negligence was made compensable. The wording was not restrictive as to the employees covered; the case of injury, except that it must constitute negligence attributable to the carrier; or the particular kind of injury resulting. To read into this all-inclusive wording a restriction as to the kinds of employees covered, the degree of negligence required, or the particular sorts of harms inflicted, would be contradictory to the wording, the remedial and humanitarian purpose, and

> the constant and established course of liberal construction of the Act followed by this Court."

The case of *Jamison* v. *Encarnacion*, 50 S. Ct. 440, 281 U. S. 635, the Court held:

> "The act is not to be narrowed by refined reasoning. * * * It is to be construed liberally to favor the purposes for which it was enacted * * *" (p. 442).

Lukon v. *Pa. R. Co.*, 131 Fed. 2d 327 at page 329:

> "The Federal Employers' Liability Act was designed to be applied liberally for the protection of railroad and other employees."

Terminal R. Ass'n of St. Louis v. *Schorb*, 151 Fed. 2d 361 at page 365:

> "One of the main purposes of the Federal Employers' Liability Act was to modify the common law barriers against recovery by an employee in a suit against his employer predicated on an industrial accident."

Tracy v. *Terminal R. Ass'n of St. Louis*, 170 Fed. 2d 635 at page 638:

> "Under the Federal Employers' Liability Act the basis of liability is negligence on the part of the employer. The purpose of the Act was * * * to abolish certain common law defenses which had theretofore been available to a railroad company when sued by its employees for injuries received. As the Act now stands it abolishes the defense embodied in the fellow servant rule, the defense of contributory negligence, and the defense of assumption of risk."

O'Rourke v. *Pennsylvania R. Co.*, 194 Fed. 2d 612 at page 615:

> "* * * to provide the railroad employees a remedy for injury or death while engaged in interstate commerce."

Shortly after 8:00 p. m.—An air test was made by John P. Hann (P91a-20).

8:15 or 8:20 p. m.—The train pulled out (P91a-16).

8:35—Discovery of body was reported to yardmaster by Michael Kobal (P19a-18).

When Shellhammer was last seen alive he;—

(a) was not wearing any work gloves,

(b) had no tools in his hands,

(c) there was no air hose on the ground or in his vicinty at the time.

After Shellhammer's death;—

(a) he was wearing a glove on his left hand,

(b) a discarded air-hose was on the ground in his vicinity.

It would seem that such facts would constitute a proper basis for a jury to determine that after the work coupling had been completed and thereafter the air test had been made shortly after 8:00 p. m., that Shellhammer heard air escaping from a connecting air-hose, put on his work gloves, shut off the air cock, discarded the defective hose, replaced it with a good one, turned on the air and the train started before he had a chance to get out from between the 23rd and 24th cars at 8:15 or 8:20 p. m.

These facts would justify an inference that respondent caused the decedent's death.

Whether a duty was violated was for the jury to say.[12]

The defendant was under a duty of so acting, in respect of existing facts and circumstances, as not to inflict upon Shellhammer fatal injury if such could have been avoided by the exercise of that degree of care and prudence which men of ordinary judgment and prudence would reasonably be expected to exercise under like conditions.[13]

In addition to the negligence of the defendant in failing to make diligent and proper inquiry as to whether or not it was safe to start the train under the prevailing circumstances, the respondent was guilty of further fault in violating its own rule (Rule 30), which provides for the ringing of a bell when the engine is about to move (P28a-11).

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[12] In *Austin* v. *Pennsylvania Ry. Co.*, 82 N. J. L. 416 (E. & A. 1911), Justice Swayze said:

> "All that is required is that the circumstances should be so strong that a jury might properly, on ground of probability, rather than of certainty, exclude the inference favorable to the defendant. The question arises only where the evidence is circumstantial, and where probability may be all that is attainable."

To have the quality of negligence, human action or non-action does not have to be in the light of absolute knowledge that another will be injured thereby.

See: *Texas & P. Ry. Co.* v. *Mix*, 193 S. W. R. 2nd 542.

[13] See: *B. C. & A. Ry. Co.* v. *Turner*, 152 Md. 228, 136 A. 609 (1927); *Dickey* v. *Hochschild Korn & Co.*, 157 Md. 450, 146 A. 282 (1929); *Benedick* v. *Plotts*, 88 Md. 52, 40 A. 1067 (1898); *Jackson* v. *Pa. R. R. Co.*, 3 A. 2nd 719 (Md. E. & A. 1939).

Such violation constituted negligence.[14]

The train was started at the suggestion of James O'Donnell, who could not and did not see 6 to 8 cars (P66a-1). The train was composed of 48 cars (P16a-17).

Joseph Smith, the Yard supervisor, testified in answer to the question as to whether he heard the bell rung, that he couldn't say whether he heard the bell rung (P23a-9), but he heard the whistle (P23a-22).

The presumption of decedent's due care for his own safety exists as a matter of law. See: *Tennant* v. *Peoria & P. U. Ry, Co., supra.*

> "Evidence that railroad employee was killed approximately at point where engine, in violation of railroad rule, commenced backward movement without warning and where employee might properly have been together with presumption that employee was engaged in performance of his duties and exercised due care for his own safety, was sufficient to authorize jury finding that negligence of railroad was proximate cause of employee's death. Federal Employers' Liability Act, Sec. 1 et seq., as amended, 45 U. S. C. A. Sec. 51 et seq."

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[14] The identical situation was held to constitute liability by the United States Supreme Court in the case of *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29 (1944), and also by the Court of Appeals, Third Circuit, in the case of *Eiseman* v. *Pennsylvania R. Co.*, 151 Fed. Rep. 2nd 222 (3 C. C. A. 1945).

In the *Tennant* case, *supra*, the defendant's rule which was violated referred to bell signals as does Rule 30 of the defendant which provides as follows:

> "30. The engine bell must be rung when an engine is about to move, when running through tunnels, while approaching and passing public crossings at grade, passenger stations and when passing trains standing on adjacent tracks, including yard tracks."

> "35. The following signals will be used by flagmen: Night signals—A red light, a white light, torpedoes and fuses."

POINT III

Petitioner was denied both her constitutional right to a jury trial and due process of law.

This denial of due process of law seems to be indicated by the following:

The Court below barred any testimony as to a generally accepted standard of care and, for that matter, any evidence as to the standard of care established by the respondent itself.

During the testimony of John T. Van Orman, General Car Foreman, the Court sustained objections to the following questions (P105a-12):

> "Q. Did you make any provision to have the blue light displayed while the air hose was being coupled?
>
> Mr. Broadhurst: I object to that.
> The Court: Objection sustained."

(P111a-12):

> "Q. Isn't it a fact you had a rule which I believe you personally promulgated in accordance with the rules of all railroads, that an air slip should be given to the engineer?
>
> Mr. Broadhurst: I object to that question.
> The Court: Sustained."

During the testimony of John P. Hann, Engineer, the Court sustained objections to the following questions (P97a-15):

> "Mr. Rassner: Then I make the tender of proof that there is an established usage and custom

throughout the United States before any train engineer pulls his train out of the yard, he must get an air slip from the chief inspector, and until he gets that slip he may not move the train at all out of the yard.

Mr. Broadhurst: I object to the tender of proof, if your Honor please. We are dealing with the operation of a specific railroad under its rules and regulations of that railroad. What is done elsewhere, if it is in fact done—

Mr. Rassner: I make the tender of proof, and I say that is the law.

The Court: I understand. Sustain the objection."

During the testimony of Jesse A. Kerby, called as an expert witness on behalf of the plaintiff the Court sustained an objection to the following question (P116a-5):

"Q. Can you tell us, based on your experience of some 40 odd years, whether on January 13, 1951, there was established usage and custom universal with all railroads, including the Lehigh Valley Railroad, that is all A-1 Railroads in the United States, specifying the manner of a formation of car inspectors giving information upon which a train is moved out of a yard after the cars are assembled? Yes or no.

Mr. Broadhurst: If your Honor please—
The Court: Sustain the objection."

In the case of *Wilkerson* v. *McCarthy, et al.*, 336 U. S. 53 (1949), the Supreme Court was quite concerned with

whether the railroad lived up to the standard of care commensurate to the dangers of the business.[15]

A safe place to work, adequate lookouts and warning, the surrounding facts and circumstances and the custom and practice with reference to railroad operation have always been considered as constituting factual issues exclusively within the province of the jury to decide.

In the case of *Boston & Maine R. R.* v. *Meech*, 156 F. 2d 109 (C. C. A. 1st 1946), the Court of Appeals for the First Circuit held that the failure to provide precaution of a lookout and adequate whistle signals constituted negligence.

Said Court further held that the question of whether the surrounding circumstances provided the deceased employee with a reasonably safe place wherein to work was a question of fact for the jury.

In the *Tennant* case, *supra*, it was quite apparent that where it appeared that a locomotive had remained stationary for some minutes and then started, that the question of the company's own written rules, as well as the general practice and custom also as to the ringing of an engine bell, were all material matters.

The Court below erroneously refused to permit the presumption that the decedent exercised due care for his own safety at the time of his death, in spite of such holding in the *Tennant* case, *supra*.

The Court below erroneously searched the record for conflicting circumstantial evidence in order to take the case

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[15] In the case of *Ellis* v. *Union Pac. R. Co.*, 329 U. S. 649 (1947), the question of adequate warning was held to be of basic importance. The fact that there was conflicting evidence was held not to be justification for the Court taking the case from the jury. The custom of the trade was likewise held to be an important factor.

The ability of the engineer to see or have other knowledge or information of the surrounding circumstances were also submitted as material factual questions.

away from the jury, when such procedure was specifically held to be erroneous by the Supreme Court of the United States in the *Tennant* case, *supra*.

In the case of *Eiseman* v. *Pa. R. Co., supra,* it was held that a witness who testified that he did not hear a bell ringing on the locomotive which struck plaintiff's decedent was in a position where "in all probability" he would have heard a bell signal if one had been given. Witness' testimony was more than "negative evidence" and presented question for jury on the issue of giving bell signal.

The law is clear that on a motion to direct a verdict for the defendant every fact in evidence and every reasonable inference therefrom in favor of the plaintiff is admitted by the defendant.

> *Hellweg* v. *Telephone Co.,* 110 F. 2d 546 (C. A. D. C., 1940);
> *McKinney* v. *Public Service,* 4 N. J. 229 (1950);
> *Sokol* v. *Liebstein,* 9 N. J. 93, 98 (1952).

In the case of *Howard* v. *Louisiana & A. Ry. Co.,* 49 F. 2d 571 (C. C. A. 5th, 1931), the Court stated on page 574:

> "This state of the evidence requires that the issues of fact raised upon conflicting testimony 'shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative'."

In the case of *Baltimore & Ohio R. R. Co.* v. *Groeger,* 266 U. S. 521 (1924), the Court stated on page 524:

> "The credibility of witnesses, the weight and probative value of evidence, are to be determined by the jury and not by the judge."

As early as 1830, in the case *Parsons* v. *Bedford*, 3 Pet. 433, 1830, 28 U. S. 433, the Court laid down a principle of law which has consistently been followed by all the Courts of this country, and which principle was reiterated in the case of *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, wherein the Court stated on page 378 as follows:

> "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy."

Said Court further stated, on page 378, quoting from the case of *Walker* v. *New Mexico & c. Railroad Co.*, 165 U. S. 593:

> "This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative."

In the case of *Johnson* v. *Dierks Lumber & Coal Co.*, 130 F. 2nd 115 (C. C. A. 8th, 1942), the Court stated on page 119:

> "Moreover, where reasonable men may draw different inferences from the evidence, it is the province of the jury to determine which is proper."

The Court in *Fratta* v. *Grace Line*, 139 F. (2d) 743, 744 (C. C. A. 2nd, 1943) stated as follows:

> "We take this occasion to suggest to trial judges that, generally speaking—although there may be exceptions—it is desirable not to direct a verdict at the close of the evidence, but to reserve decision on any motion therefor and allow the jury to bring in a verdict; the trial judge may then, if he thinks it improper, set aside the verdict as against the weight

of the evidence and grant the motion, Federal Rules of Civil Procedure, rule 50 (b), 28 U. S. C. A. following section 723c, with the consequence that if, on appeal, we disagree with him, we will be in a position to reinstate the verdict, thus avoiding the waste and expense of another trial. Reversed."

As late as January 31, 1949, in the case of *Wilkerson* v. *McCarthy*, 336 U. S. 53, 62, 63:

> "Moreover, this Court stated some sixty years ago when considering the proper tribunal for determining questions of negligence; 'We see no reason, so long as the jury system is the law of the land and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones v. East Tennessee, V. & G. R. Co., 128 U. S. 443, 445, 32 L. ed. 478, 480, 9 S. Ct. 118. And peremptory instructions should not be given in negligence cases 'where the facts are in dispute, and the evidence in relation to them is that from which fairminded men may draw different inferences.' Washington & G. R. Co. v. McDade, 135 U. S. 554, 572, 34 L. ed. 235, 241, 10 S. Ct. 1044. Such has ever since been the established rule for trial and appellate courts. See Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 67, 68, 87 L. ed. 610, 617, 618, 63 S. Ct. 444, 143 A. L. R. 967. Courts should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function. In rejecting a contention that juries could be expected to determine certain disputed questions on whim, this Court, speaking through Mr. Justice Holmes, said: 'But it must be assumed that the constitutional tribunal does its duty and finds facts only because they are proved.' Aikens v. Wisconsin, 195 U. S. 194, 206, 49 L. ed. 154, 160, 25 S. Ct. 3."

See:

Jacob v. *City of New York*, 315 U. S. 752, 62 S. Ct. 854 (1942).

The Supreme Court of the United States felt that the provisions of the Seventh Amendment to the Constitution which guarantees to all litigants the right to trial by jury required all cases involving railway employees to be submitted to a jury . . . its determination, prior to the enactment of the Federal Employers' Liability Act, *supra*. The enactment of this Act did not constitute an unrestricted power to a Trial Court to take from the jury unto itself the prerogative of deciding factual issues.[16]

The inference that Shellhammer was killed while in the act of changing a defective air hose in the brake system, was a matter to be accepted or rejected by a jury. The Trial Court was in error in deciding such question of fact.

See:

Lukon v. *Pennsylvania R. R. Co., supra.*[17]

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[16] *Jacob* v. *City of New York*, 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed. 1166 (1942); *Wolf* v. *Chicago, M. St. P. & Pac. R. Co.*, 180 Minn. 310, 230 N. W. 826 (1930); *Chesapeake & Ohio R. Co.* v. *Winder*, 23 F. (2d) 794 (C. C. A. 4, 1928); *Wilson* v. *Director General of Railroads*, 95 N. J. L. 482, 112 A. 732 (1921) certiorari denied 256 U. S. 700, 41 S. Ct. 538, 65 L. Ed. 1178 (1921); *Norfolk & W. R. Co.* v. *Earnest*, 229 U. S. 114, 33 S. Ct. 654, 57 L. Ed. 1096 (1913); *Dutton* v. *Atlantic Coast Line R. Co.*, 104 S. Ct. 16, 88 S. E. 263 (1916) affirmed 245 U. S. 637, 38 S. Ct. 191, 62 L. Ed. 525 (1918); *Union Pac. R. Co.* v. *Hadley*, 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751 (1918).

[17] Where a trainman was found dead beside the railroad tracks, probably from a blow on the head, and where coal was found on his cap and a coal car had recently passed that spot, it was within the province of the jury to infer that a piece of coal fell off the car striking him fatally.

The importance of trial by jury cannot be over emphasized nor the denial of said constitutional right be permitted to go unchallenged.[18]

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[18] *O'Donnell* v. *Elgin J. & E. Ry. Co., supra*:

"We need not resolve the conflict between these competing theories of causation, for that decision was for the jury. Ellis v. Union Pacific R. Co., 329 U. S. 649, 653, 67 S. Ct. 598, 600, 91 L. Ed. 572."

Williams v. *N. Y. Central R. Co., supra*, citing the cases of *Tiller* v. *Atlantic Coast Line R. Co.*, 63 S. Ct. 444, 318 U. S. 54; *Bailey* v. *Central Vermont Ry., Inc.*, 63 S. Ct. 1062, 319 U. S. 350; *Tennant* v. *Peoria & P. U. Ry. Co.*, 64 S. Ct. 409, 321 U. S. 29; *Lavender* v. *Kurn*, 66 S. Ct. 740, 327 U. S. 645; *Jesionowsky* v. *Boston & M. R. R.*, 67 S. Ct. 401, 329 U. S. 452; *Ellis* v. *Union Pac. R. Co.*, 67 S. Ct. 598, 329 U. S. 649; stated:

"In actions under the Federal Employers' Liability Act the rule for measuring the sufficiency and amount of evidence necessary to justify the submission of the case to the jury is that established by the Supreme Court of the United States * * * and it is clear from its recent decisions that the authority of courts to withdraw from the consideration of a jury the question of a defendant railroad company's negligence and its proximate relation to the injury is now very restricted." Page 506.

Lukon v. *Pennsylvania R. Co., supra.*

"Although there was no witness who actually saw Lukon struck, there was ample circumstantial evidence to indicate how he was injured. Such evidence has probative value equal to that of testimonial evidence. Wigmore on Evidence, Third Edition, Section 36."

Lavender v. *Kurn*, 66 S. Ct. 740, 327 U. S. 645 held:

"Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference."

Cited with approval in *Casey* v. *American Export Lines Inc.*, 173 Fed. 2d 324, reversed on other grounds.

Mr. Justice Butler declared in the case of *Jamison* v. *Encarnacion, supra*:

> "The act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted, and to that end the word may be read to include all the meanings given to it by courts, and within the word as ordinarily used."

The proof in the case at bar seems to come squarely within the four corners of the principal of law as enunciated repeatedly by this Court as requiring the submission of such instant case to the jury.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

SAMUEL M. COLE,
Attorney for Petitioner.

JACOB RASSNER,
of Counsel.

Jones v. *East Tennessee, Virginia, Georgia R. Co.*, 9 S. Ct. 118, 128 U. S. 443:

> "We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these (negligence, etc.) as well as others."

Missouri-Kansas-Texas R. Co. v. *Evans*, 250 S. W. 2nd 385:

> "The Federal cases hold that this matter of causation must be submitted to the jury unless there is a complete absence of probative facts to support the jury's finding (p. 391).

APPENDIX

(Opinion of Supreme Court)

Argued November 30, 1953—Decided January 25, 1954.

On certified appeal from the Appellate Division of the Superior Court.

Mr. Louis J. Greenberg argued the cause for the appellant. Mr. Samuel M. Cole, Attorney.

Mr. Charles W. Broadhurst argued the cause for the respondent. Messrs. Emory, Langan & Lamb, Attorneys.

The opinion of the Court was delivered by

Heher, *J.*

On January 13, 1951 the deceased Walter R. Shellhammer suffered fatal injuries while pursuing his employment in interstate commerce with the defendant railroad; and, asserting actionable negligence under the Federal Employers' Liability Act, 35 *Stat.* 65, 36 *Stat.* 291, 53 *Stat.* 1404, 45 *U. S. C., sec.* 51, *et seq.*, recovery is sought in this proceeding of the pecuniary loss sustained by the widow and next of kin of the deceased.

There was a judgment of dismissal at the close of plaintiff's case, for want of proof of a negligent failure of duty as the proximate cause of the fatality; and the Appellate Division of the Superior Court affirmed the consequent judgment. We certified the cause for appeal on plaintiff's motion.

The deceased was a foreman of car inspectors and repairers. His particular assignment involved the assembling of three groups of freight cars into a single train, in the railroad's Jersey City freight yard, for movement to Oak Island, eleven miles away. The last of the cars were coupled, the air hose connected and the valves opened by two car inspectors under the deceased's immediate super-

vision, and the operating test was then made preliminary to setting the train in motion. The test was satisfactory; and, after building up a reserve of air pressure, a matter of a very few minutes at the most, the engineman blew the engine whistle to indicate he was ready to move, whereupon the conductor gave the engineman the starting signal, and the train was put into motion, the engineman the while ringing the engine bell, and the train moved out of the yard. Shortly thereafter, the decapitated body of Shellhammer was found between the rails of the track, the arms at shoulder level and the left hand gloved.

The contention is that the train was moved without adequate warning while Shellhammer was yet engaged in replacing a defective air hose lately discovered between the two cars of the train. A length of air hose was found a short distance from the body; and it is theorized that after the two car inspectors "had concluded their work, given the all-clear signal and left, Shellhammer observed that a leak had sprung in the hose between the 23rd and 24th cars", and he "thereupon put on his work gloves, shut off the air supply, replaced the defective hose with a good one, threw the defective hose on the ground where it was subsequently found and just as he turned the angle cock to turn the air on, the train started and killed him." The ordinary presumption of due care by the deceased for his own safety is invoked.

The question is whether there is evidence to sustain this hypothesis of negligence. Appellant's insistence is that defendant's employees knew, or in the exercise of reasonable care, should have known, that Shellhammer "was in the vicinity of the train," and that "a leak in an air hose or any defect, for that matter, might present itself at any moment," and "a conscientious employee like Shellhammer would take steps to remedy such a situation," and under the statute "the jury is the appropriate tribunal to determine the questions of reasonable care and proximate cause."

But, if there is to be a submission to the jury, there must of necessity be a sufficient showing of negligence, if the evidence be accredited, to sustain the pleaded cause of action. Liability under the Act arises from negligence causing injury, and not from the injury itself. The common-law concept of negligence is embodied in the Federal statute. The question is what a reasonable and prudent person would have done under the circumstances; and, where fair-minded men would differ on that, the issue goes to the trier of the facts. *Stone* v. *New York, C. & St. L. R. Co.*, 344 U. S. 407, 73 S. Ct. 358, 97 L. ed. 441 (1953). And the injury must perforce be the natural and probable consequence of the negligence or wrongful act, such as ought to have been foreseen in the light of the attending circumstances. Events "too remote to require reasonable prevision need not be anticipated." *Brady* v. *Southern R. Co.*, 320 U. S. 476, 64 S. Ct. 232, 88 L. ed. 239 (1943). The burden of proving negligence and proximate cause rests upon the plaintiff; "mere speculation" is not enough; the question is whether there are probative facts reasonably justifying the inference of fault and proximate cause, and when such is the case it is for the jury to determine whether that inference ought to be drawn. *Tennant* v. *Peoria and Pekin Union R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. ed. 520 (1944); *Moore* v. *Chesapeake & Ohio Railway Co.*, 340 U. S. 573, 71 S. Ct. 428, 95 L. ed. 547 (1951). Since the right of action comes by a federal statute, under the Supremacy Clause of the Federal Constitution, *Article* VI, the State courts must conform. The sufficiency of the evidence in this regard is a federal question reviewable by the Federal Supreme Court, to insure the authority of the Act in the State courts. There must be more than a scintilla before a factual issue is raised for the jury. When the evidence is such that, without weighing the credibility of the witnesses, the absence of negligence is the only reasonable conclusion, there is no issue for the jury. *Brady* v. *Southern R. Co.*, cited *supra*.

Such is the rule in the judicial administration of New Jersey's negligence law, derived as it is from the common law. The scintilla rule does not obtain here. The question is whether the trier of the facts could, on any reasonable view of the evidence, rejecting all evidence and inferences unfavorable to the plaintiff, find that the plaintiff had established the facts essential to his asserted cause of action. Is there any evidence which, if accepted and given its fullest probative force, reasonably tends to sustain the pleaded cause of action? Mere surmise or conjecture is not enough. *Sivak* v. *New Brunswick*, 122 N. J. L. 197 (E. & A. 1939). This is the English common-law rule. Are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain? *Bridges* v. *The Directors, etc. of the North Linden Railway Co.*, L. R. 7 H. L. 213.

So assessed, the evidence here does not make for a factual inquiry by the jury.

The coupling of the cars had been completed, the air-brake operating test had been made, and the train was ready to proceed. There was every reason to believe, when the moving signal was given, that the deceased and his air inspectors had finished their work and had departed from the scene. So far as appears, there was due circumspection in this regard. When the air-brake test proved satisfactory, one of deceased's inspectors, in his own presence, called out to the trainman nearby that "the train is all yours," meaning, it is conceded, that it was in readiness to go, and the deceased then said, "Good night, I will see you next week."

There is no tangible evidential basis for the inference that the apparently discarded piece of air hose found nearby was connected with the deceased's operations. His work was supervisory; but, conceding the possibility of a sudden emergency, the wrench which it is acknowledged was an indispensable tool in the replacement of an air hose

was nowhere to be found; nor was there a lantern, the hour being 8:20 P. M. And the deceased did not conform to the established rule, for the worker's own protection, that when emergency repair work is to be done under such circumstances, a signal shall be given to the engineman and fireman. No such signal was given. In a word, there was no reason whatever to anticipate the deceased's presence in a place of danger when the train was put into operation; quite the contrary.

Indeed, in the final analysis, the specific ground of negligence asserted on the brief is that it is shown by "uncontradicted evidence" that "an interval of 15 to 20 minutes had elapsed between the all-clear signal, followed by the air-brake test, which took thirty seconds; and the actual starting of the train by Hann, the defendant's engineer;" that "no one was assigned to check up and take any steps to ascertain if a change of status had occurred during that 15 to 20 minute interval during which no check-up or investigation had been made to prove it was safe to start the train," "as to whether or not the decedent or anyone else was working at or about the train or between the cars," and the "engineer started the train relying solely on an all-clear signal which had been given to him 15 to 20 minutes earlier."

The Court's preargument examination of the record revealed no ground whatever for the statement that between 15 to 20 minutes intervened between the giving of the all-clear signal and the movement of the train; and on the oral argument, when counsel was asked to point out the evidential justification for this factual assertion, he was unable to do so and then agreed that it had no basis in the record. In ostensible support of this affirmation of fact, the brief cites evidence tending to show that there was an interval of 15 minutes between "the time of the last coupling" of cars "until the time the train moved out of the yard, started to move," a radically different thing. Thus, the basic factor in the charge of negligence made on

the brief is not sustained by the proofs. The train went into timely motion in accordance with the only signal given; there was no interval calling for a renewal of the signal before the train was actually put into operation. A finding of culpable negligence in these circumstances would be purely conjectural and utterly devoid of the factual substance requisite for liability under the statute.

Affirmed.

A true copy.

JOHN H. GILDEA
Clerk